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No. 84-1304

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE SYNANON CHURCH, CHARLES E. DEDERICH,
Petitioners,

– AGAINST –

READER'S DIGEST ASSOCIATION, INC., DAVID MACDONALD,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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ARGUMENT

THE RECENT FILING OF THE PETITION FOR WRIT OF CERTIORARI IN ANDERSON V. LIBERTY LOBBY AND THE RECENT OPINION BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE TAVOULAREAS CASES FURTHER DEMONSTRATE THE EXISTING CONFLICT BETWEEN THE OPINION OF THE LOWER COURT AND THE OPINIONS OF THIS COURT, FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT.

The Petition for Certiorari filed in this Court in *Anderson v. Liberty Lobby* (No. 84-1602), together with the instant Petition, demonstrate one of the critical conflicts now raging in the courts as to the proper treatment of a libel

case: Is summary disposition of a libel case a favored remedy such that a plaintiff is required to prove his case before trial with convincing clarity, as the *Reader's Digest* Court held, or are rules on summary disposition the same for a libel case as in any other tort case, as this Court has indicated and the *Liberty Lobby* Court has held? This conflict can only be resolved by this Court.[1]

The opinion in *Tavoulareas v. Piro* and *Tavoulareas v. Washington Post*, No. 83-1604 and No. 83-1605, slip op. (D.C. Cir. April 9, 1985) further highlights the conflicting formulations of significant rules governing libel cases and the need for this Court to resolve these matters.[2] The *Tavoulareas* Court considered many of the same issues raised in the instant Petition and resolved those issues in a diametrically contradictory way to the *Reader's Digest* Court. The dissenting opinion by Judge Wright also offers a further illustration of the sharp polarization in the courts on these constitutional issues. Following is a list of rules enunciated by the *Tavoulareas* Court with a reference to portions of the instant Petition demonstrating the conflict between the *Tavoulareas* Court's analysis and the *Reader's Digest* Court's analysis:

> 1. The safeguards in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) adequately protect against any potential chilling effect on First Amendment liberties which may be caused by a libel proceeding, and, therefore, summary disposition of a libel

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[1]Since the conflict between the two cases was extensively briefed in the Petition in the instant case and since the conflict can be further seen by comparing Anderson's Petition, Petitioners will not burden this Court with repetitive argument.

[2]Copies of the slip opinion are lodged with the Court and served on opposing counsel. References to portions of the slip opinion are indicated herein as "*Tavoulareas* Opinion."

suit is not a favored remedy. *Tavoulareas* Opinion, 18-19. *Compare,* Petition, Argument I, at 10-16.[3]

2. Courts must follow in libel cases the normal rules for examining evidence on summarily dispositive motions, including adherence to the prohibition against weighing evidence, the prohibition against evaluating the credibility of witnesses, and the requirement that all reasonable inferences must be made in a light most favorable to the party opposing the motion. *Tavoulareas* Opinion, 19-27. *Compare,* Petition, 16 n. 11.

3. A libel plaintiff does not need to have a single piece of evidence which by itself establishes actual malice, but may prove actual malice by the cumulative effect of circumstantial evidence. *Tavoulareas* Opinion, 38-39, 43, 56, 74 n. 48 and 82. *Compare* Petition, Argument II, at 17-19.

4. Evidence that a writer knowingly adopted an adversarial mind-set toward the plaintiff is "highly probative of whether he acted knowingly or recklessly in writing his falsehoods." *Tavoulareas* Opinion, 50. *Compare,* Petition, 6 ("very, very nasty indeed"), 9 and 20 ("I initiated 1st expose — but, alas, the story was ignored") and 6 and 21 (failure to contact petitioners or anyone possibly favorable to petitioners).

5. The *New York Times* actual malice standard adequately protects the public's interest in the watchdog service that newspapers perform, and the public interest "is not further protected by requiring the jury to blind itself to evidence of editorial pressure for sensationalistic stories." *Tavoulareas* Opinion, 54 n. 39. *Compare,* Petition, 9 & n. 8. (Petitioners' need for discovery from editors.)

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[3]References to portions of Synanon's and Mr. Dederich's Petition for Certiorari are indicated herein as "Petition."

6. A defendant's selection of the most damaging inference from among a number of ambiguities, even if the inference is objectively reasonable, may be probative of a determination to incorrectly describe the plaintiff, place him in the most damaging light, and thereby with other evidence demonstrate a state of mind that is probative of a reckless disregard for the truth. *Tavoulareas* Opinion, 55. *Compare,* Petition, 7 n. 6 (literary license), 9 n. 7 (editorial deletion).

7. "The writer who suppresses favorable facts is more likely to suspect that his version is not substantially true. Hence, courts have held repeatedly that the choices of *which* facts to report *is* relevant to the question of actual malice. [Citations.] [¶] Similarly, deliberate slanting is further evidence of a purpose to 'get' the plaintiff and is thus probative of actual malice." *Tavoulareas* Opinion, 61 (emphasis in original). *Compare,* Petition, 8-9 (editorial deletion of Jack Hurst as a "onetime heroin user" over reporter's objection for "accuracy"), and 21 (failure to contact petitioners or anyone possibly favorable to petitioners).

8. When a source denies having told the reporter what the reporter claims to have been told, it is plausible that either the source or the reporter is being less than truthful. Since it is possible that the reporter deliberately falsified his notes, which must be considered in looking at the evidence in the light most favorable to plaintiff, and since the determination requires evaluating credibility, it is inappropriate for a court to resolve the issue on a motion for summary disposition. *Tavoulareas* Opinion, 64. *Compare,* Petition, 7, 23-24 and Appendix E (Assertions of Reader's Digest Contradicted by Ofshe & Mitchell).

9. "Reliance on the unsupported word of obviously biased sources for key allegations is *evidence* which a jury is entitled to consider in evaluating the existence of actual malice." *Tavoulareas* Opinion, 74 (emphasis in original); *see, generally*, 67-74. *Compare*, Petition, 7 and 21 n. 13.

10. "Falsehoods uttered at leisure are more likely to be deliberate than those published in haste. Absence of time pressure in this case is evidence that the jury could fairly consider." *Tavoulareas* Opinion, 75. *Compare*, Petition, 6, 21-22 (no time pressure for article, grossly inadequate investigation, and admission that story was not hot news).

The foregoing index of conflicting points designates where the *Tavoulareas* Court and the *Reader's Digest* Court are in irreconcilable conflict. The pending *Anderson v. Liberty Lobby* Petition, when compared to the instant Petition, further shows the current judicial conflict. The rules for libel cases in the District of Columbia Circuit are diametrically contradictory to the rules in the State of California, and both jurisdictions claim to be bound to their positions by decisions of this Court. These conflicts, with the other conflicts among the federal courts of appeals and the state courts of last resort as presented by the Petition

and this Supplemental Brief, can only be resolved by this Court, and such resolution is of the utmost urgency.

Respectfully submitted,

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